Supreme Court U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

SUSAN FRANK,

Petitioner,

against

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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54 pp

QUESTIONS PRESENTED

1. Must the government prove at least one timely overt act charged in the indictment to satisfy the statute of limitations in a conspiracy prosecution under 18 U.S.C. §371?

2. Does the Fifth Amendment's Grand Jury Clause permit the government to obtain a conspiracy conviction under 18 U.S.C. §371 without proving a charged overt act?

3. Is a 12-month course of conduct an overt "act" within the meaning of 18 U.S.C. §371?

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OPINIONS BELOW

The decision of the United States Court of Appeals for the Second Circuit affirming petitioner's judgment of conviction is reported as United States v. Frank, 156 F.3d 332 (2d Cir. 1998) (Cabranes, *Circuit Judge*, and Parker, *District Judge*), a copy of which is annexed hereto as Appendix A.

The unreported order of the United States Court of Appeals for the Second Circuit, dated November 20, 1998, denying petitioner's petition for rehearing with a suggestion for rehearing *in banc* is annexed hereto as Appendix B.

JURISDICTION

The judgment of the United States Court of Appeals sought to be reviewed was entered on September 15, 1998, and the order of that court denying petitioner's petition for rehearing was entered on November 20, 1998. The Court's jurisdiction is invoked pursuant to 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES

The following constitutional provisions and statutes are involved in this case.

United States Constitution, Amendment V:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury....

United States Constitution, Amendment VI:

> In all criminal prosecutions, the accused shall enjoy the right ... to be informed of the nature and cause of the accusation....

18 U.S.C. §371:

> If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined under this title or imprisoned not more than five years, or both....

18 U.S.C. §3282:

> Except as otherwise expressly provided by law, no person shall be prosecuted, tried, or punished for any offense, not capital, unless the indictment is found or the information is instituted within five years next after such offense shall have been committed.

STATEMENT OF THE CASE

Petitioner Susan Frank, a married mother of four and the former Commissioner of Ports and Terminals of the City of New York, was indicted in the Eastern District of New York on July 1, 1993, and charged in a multi-count indictment with, *inter alia*, conspiracy to commit mail fraud (18 U.S.C. §1341), in violation of 18 U.S.C. §371. The indictment alleged that petitioner conspired with family members and employees of a family-owned marine company, which was part of a sewage sludge hauling joint venture, to bill municipal sewage authorities surrounding New York Harbor for disposal of their sludge at least 106 miles offshore, as required by federal regulations, when the sludge was on occasion dumped closer to shore.

According to the indictment, the conspiracy existed from approximately January 1988 to January 1989. The indictment also alleged that eight overt acts, "among others" not set forth in the indictment, were committed in furtherance of the conspiracy. The first five overt acts alleged illegal sludge dumping near Staten Island on five separate occasions, each more than five years before the return of the indictment (¶19a-e).[1] Two overt acts alleged conduct by petitioner or coconspirators that caused company employees to falsify records in August 1988 (¶19f) and dump sludge illegally in New Jersey waters on October 30, 1988 (¶19g). The final overt act alleged that, between February 1988 and January 1989, petitioner and her coconspirators

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1. "¶" refers to paragraphs in the final redacted indictment on which petitioner was tried, which is reproduced at A.106-112 of petitioner's appendix in the Court of Appeals, cited herein as "A. ___." The trial transcript is cited herein as "T. ___."

caused the joint venture "to send fraudulent bills through the United States mails to public entities in New York and New Jersey, which requested payment for the legal disposal of sewage sludge at the 106 Mile Dump that was, in fact, illegally disposed of elsewhere." ¶19h.[2]

Following her acquittal at a trial on severed counts, petitioner, her brother and sister, and a tugboat captain were tried solely on the conspiracy count before Judge Jack B. Weinstein and a jury in March 1996. Noting that the case raised a real statute of limitations issue (A. 496, 518; see 18 U.S.C. §3282), the trial judge decided to depart from the instruction he "normally" gave, in order to help the government over its "problem." A. 518. Over objection (A. 426, 498, 519), the trial judge instructed the jury that it could convict petitioner of the charged conspiracy, and find the statute of limitations satisfied, on the basis of an uncharged overt act, so long as the overt act was timely (i.e., occurring after July 2, 1988) and "substantially the same as one explicitly charged." A. 607, 610. The trial judge also told the jury that it could convict petitioner on the basis of the overt act alleged in ¶19h. A. 609. On April 1, 1996, following a government summation in which it argued that it had "proved," and the jury could "eas[ily]" find, "a million overt acts" (A. 551), the jury convicted petitioner.[3] The trial judge rejected a defense request for a "special verdict on the overt acts." A. 628.

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2. The defense repeatedly but unsuccessfully sought a bill of particulars to clarify this overt act.

3. The jury also convicted petitioner's sister, but acquitted her brother. The trial judge had previously acquitted the tugboat captain at the end of the government's case.

Petitioner was later sentenced to a three-year term of probation (including eight months of home confinement which she is now serving) and a $10,000 fine. The trial judge found that restitution was "inappropriate" because the sewage authorities, the intended victims of the mail fraud conspiracy, did not suffer "loss" and "don't seem to be interested in restitution." A. 629-30, 832-37.

The Court of Appeals affirmed petitioner's conviction. United States v. Frank, 156 F.3d 332 (2d Cir. 1998) (Appendix A), and subsequently denied petitioner's petition for rehearing containing a suggestion for rehearing *in banc* (Appendix B).

REASONS FOR GRANTING THE WRIT

For decades judges and responsible commentators have warned about the dangerous sweep and elasticity of federal conspiracy law. See Krulewitch v. United States, 336 U.S. 440, 445 (1949) (Jackson, J., concurring) (government's use of conspiracy statute exemplifies the "tendency of a principle to expand itself to the limit of its logic") (quoting Cardozo, The Nature of the Judicial Process 51 (1921)); Harrison v. United States, 7 F.2d 259, 263 (2d Cir. 1925) (L. Hand, J.) (conspiracy statute, "the darling of the modern prosecutor's nursery"); Note, Developments in the Law – Criminal Conspiracy, 72 Harv. L. Rev. 920 (1959). The decision of the Court of Appeals in this case exacerbates that tendency in the one area where Congress and this Court appeared to have provided some content and limits, i.e., the pleading and proof of overt acts.

This case presents fundamental questions of federal conspiracy law that one would have thought had long been settled. See, e.g., 1 Sand, et al., Modern Federal Jury Instructions, ¶19.01, p. 19-50 (1997) ("It is universally accepted that the government must prove at least one of the overt acts described in the indictment..."). Surprisingly, these issues, which affect every federal conspiracy prosecution, not only remain unresolved, but have engendered considerable confusion, as evidenced by the fact that a split exists among the circuits as to at least one of them even though this Court spoke authoritatively on the issue nearly a century ago and repeatedly since. Win or lose, we respectfully submit that some or all of these issues should be resolved in this case.

I.

This petition presents an important issue on which the circuits are divided: Must the government prove a timely overt act alleged in the indictment in order to satisfy the five-year limitations period in a conspiracy prosecution under 18 U.S.C. §371? The Second Circuit itself had explicitly left this question open for 15 years before deciding it against petitioner.[4] The Fourth, Fifth and Eleventh Circuits squarely reject the Second Circuit's holding that "the statute of limitations may be satisfied by proof of an overt act not explicitly listed in the indictment." 156 F.3d at 339.[5] As the Fifth Circuit held in the seminal case on this issue, "*for purposes of the statute of limitations the overt acts alleged in the indictment and proved at trial mark the duration of the conspiracy.*" Davis, 533 F.2d at 929 (original emphasis). The Third Circuit is in accord with the Second Circuit's holding in this case.[6] The Tenth Circuit is itself evenly divided on the question whether the indictment must allege a timely overt

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4. United States v. Fletcher, 928 F.2d 495, 501 (2d Cir. 1991); United States v. Guerro, 694 F.2d 898, 902 n.6 (2d Cir. 1982).

5. United States v. Davis, 533 F.2d 921, 929 (5th Cir. 1976); United States v. Head, 641 F.2d 174, 178 n. 5 (4th Cir. 1981); United States v. Butler, 792 F.2d 1528, 1533 (11th Cir. 1986); United States v. Dynalectric Co., 859 F.2d 1559, 1564 & n.6 (11th Cir. 1988).

6. United States v. Schurr, 794 F.2d 903, 907 n.4 (3d Cir. 1986).

act in the first place, demonstrating the confusion that reigns in this area.[7]

This split among the circuits is perplexing since this Court appears to have decided this precise issue in petitioner's favor more than 80 years ago. Brown v. Elliott, 225 U.S. 392, 401 (1912) ("where, during the existence of [a] conspiracy, there are successive overt acts, the period of limitations must be computed from the date of the last of them of which there is an appropriate *allegation and proof*") (emphasis added). The Court has never retreated from, or even questioned, its ruling in Brown. See Yates v. United States, 354 U.S. 298, 333 (1957) (in considering sufficiency challenge to conspiracy conviction, Court limits itself to overt acts alleged in indictment, beginning its analysis by noting that "[o]nly 2 of the 11 overt acts alleged in the indictment to have occurred within the period of the statute of limitations were proved"); Grunewald v. United States, 353 U.S. 391, 406 n.20 (1957) (rejecting government's theory that objectives of conspiracy included "fixing" new tax-fraud cases because "no overt act done to further the purpose of engaging in 'new' business was *charged or proved* to have

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7. United States v. Stoner, 98 F.3d 527, 531-38 (10th Cir. 1996), aff'd, 139 F.3d 1343 (10th Cir. 1998) (*in banc*). Because the *in banc* Tenth Circuit was evenly divided on the issue whether, for statute of limitations purposes, an indictment charging a §371 offense must allege "at least one specific overt act occurring within the limitations period established by 18 U.S.C. §3282," the effect of the *in banc* decision was to affirm the district court's rejection of that proposition, although the *in banc* court vacated the Stoner panel's 2-1 decision affirming the district court on this issue. Thus, the Tenth Circuit is hopelessly divided and has no authoritative law on the issue this petition presents.

occurred after October 25, 1951") (emphasis added); Fiswick v. United States, 329 U.S. 211, 216 (1946) ("The overt acts *averred and proved* ... mark the duration, as well as the scope, of the conspiracy") (emphasis added); United States v. McElvain, 272 U.S. 633, 637 (1926) (upholding dismissal of indictment on pretrial motion because "no act is alleged to have been done later than ... three years prior to the indictment").[8]

Here, the Second Circuit ignored those decisions of this Court which were squarely on point. The Court of Appeals could perceive "no reason to devise a special rule for the statute of limitations requirement that is different from the rule governing the overt act element" (156 F.3d at 339), and applied the notice/prejudice analysis governing cases involving a simple variance between pleading and proof. Thus, rather than follow the rule already devised by this Court, which requires the pleading and proof of at least one timely overt act, the Court of Appeals reasoned backwards from its own questionable determination on the separate and distinct issue whether uncharged overt acts can satisfy the overt act element of §371. See infra Point II.[9]

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8. We are aware that the government successfully opposed a petition for a writ of a certiorari in Stoner, 119 S. Ct. 403 (1998), by arguing, *inter alia*, that the statute of limitations is only an affirmative defense, and need not be satisfied by allegation in the indictment. Brief for the United States in Opposition in Stoner v. United States, No. 98-68 (Sept. 1998), at 9. McElvain refutes that assertion.

9. The only authority the Second Circuit cited for its approach to the statute of limitations issue was Schurr, which illogically leapt from the uncontested proposition that the

(continued...)

The Court of Appeals attempted to distinguish Davis, which faithfully cited and followed this Court's precedent, on the basis that in petitioner's case "the grand jury charged and the government proved timely overt acts," while in Davis "*none* of the overt acts alleged in the indictment was timely." 156 F.3d at 339 n.10 (original emphasis). The distinction is illusory. Petitioner's argument was and is that, regardless of the number of timely overt acts alleged in the indictment, the trial judge erred because he expressly told the jury that it could rely exclusively on other, uncharged overt acts to satisfy the statute of limitations.[10] In rejecting that argument, the Second Circuit directly contradicted the rule articulated in Davis and its progeny, as well as this Court's precedent, that the statute of limitations in a conspiracy case must be computed from the date of the last overt act "of which there is an appropriate allegation *and* proof." Brown, 225 U.S. at 401 (emphasis added); see Fiswick, 329 U.S. at 216; Davis, 533 F.2d at 929. Under the Second Circuit's rationale, the duty of the government to plead a timely overt act, which that court appeared to accept, is meaningless because the Second Circuit will allow the government to satisfy the statute of limitations by proving an unpleaded overt act.

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9. (...continued)
government is entitled to "'prove overt acts not listed in the indictment'" to the notion that the government can "'satisfy its requisite showing under the statute of limitations by means of an overt act not listed in the indictment.'" 156 F.3d at 339 (quoting Shurr, 794 F.2d at 907 n.4).

10. The government cannot establish, and the Court of Appeals could not find, that the jury relied on a timely overt act alleged in the indictment because the district court denied a defense request for a special interrogatory as to the overt acts on which the verdict was based.

Nor is there anything particularly special or onerous about a rule imposing on the government the simple, easily satisfied obligation to prove at least one timely overt act charged in the indictment. On the contrary, exempting the government from that requirement would give the government special and unfair advantages, including the ability to allege timely overt acts which it knows it cannot prove, thereby permitting it to avoid dismissal of an indictment on pretrial motion on statute of limitations grounds. Indeed, the jury instruction petitioner challenges was a special instruction the trial judge gave in this case to help the government overcome a "substantial statute of limitations problem" (A. 518), even though he "normally" instructed in the manner required by Davis and this Court's decisions.

The circuits are divided on the statute of limitations issue, and the Second Circuit's decision exacerbates the division. See U.S. Sup. Ct. Rule 10(a). The decision below also conflicts with relevant decisions of this Court. See U.S. Sup. Ct. Rule 10(c). The writ should be granted to permit review of this important issue of federal conspiracy law.

II.

This case presents another fundamental issue of federal conspiracy law on which this Court has never directly spoken: Since an overt act is an essential element of a conspiracy charge under 18 U.S.C. §371, a matter on which Congress left no doubt, shouldn't the government be required to prove at least one overt act alleged in the indictment? Put another way, doesn't the Fifth Amendment's Grand Jury Clause prevent the government from convicting a defendant of a §371 conspiracy based solely on an overt act never charged by the grand jury?

The Second Circuit cited a long list of cases for its holding that "the overt act element of a conspiracy charge may be satisfied by an overt act that is not specified in the indictment, at least so long as there is no prejudice to the defendant." 156 F.3d at 337. Conspicuously absent from that string citation is any decision by this Court. In fact, the Court has never ruled on this issue. We respectfully submit that it is time for the Court to do so.

The general federal conspiracy statute is simplicity itself. It requires only that two or more persons conspire to commit any federal crime, and that "one or more of such persons do any act to effect the object of the conspiracy." See supra p. 2. Congress intended the overt act requirement to play a critically important role because overt acts are the only external manifestation of a crime otherwise "predominantly mental in composition." Krulewitch, 336 U.S. at 447-48 (Jackson, J., concurring). Overt acts demonstrate that "the conspiracy is at work, and is neither a project still resting solely in the minds of the conspirators nor a fully completed operation no longer in operation." Yates,

354 U.S. at 334. The commission of an overt act is an essential element of a §371 conspiracy. See United States v. Shabani, 513 U.S. 10, 14 (1994) (overt act is "explicit requirement" and "additional element" of §371, but not of 21 U.S.C. §846). Indeed, the Court of Appeals in this case recognized as much. 156 F.3d at 337 & n.5.[11]

Here, the indictment alleged eight overt acts, but the trial judge told the jury, over objection, that it could convict petitioner of the conspiracy solely on the basis of an uncharged overt act, i.e., an overt act "substantially the same as one explicitly charged." The trial judge did not define what he meant by "substantially the same." At the risk of stating the obvious, however, an uncharged overt act "substantially the same" as a charged overt act is *not* an overt act found by the grand jury and charged in the indictment. Yet the jury

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11. The overt act requirement has been a central feature of the federal conspiracy statute since §371's earliest predecessor was enacted in 1867. R.S. §5440, 14 Stat. 484 (1867). Indeed, the framers of the Constitution were well acquainted with overt acts and their importance, for they included an overt act requirement in the Treason Clause. U.S. Const. art. III, §3 ("No Person shall be convicted of Treason unless on the Testimony of two Witnesses to the same overt Act"). It is reasonable to suppose that the 39th Congress, which enacted §371's predecessor soon after the Civil War ended, had the Treason Clause in mind, and intended the overt act element of the statute to be accorded similar importance. See Cramer v. United States, 320 U.S. 1 (1945) (Jackson, J.) (interpreting overt act requirement in Treason Clause); United States v. Burr, 25 F. Cas. 55, 170 (1807) (Marshall, C.J.) ("If it be necessary to specify the charge in the indictment, it would seem to follow, irresistibly, that the charge must be proved as laid. All the authorities which require an overt act, require also that this overt act should be proved....").

was permitted to substitute its own rough understanding of the term for any narrower meaning that the trial judge or the Court of Appeals had in mind. As a result, the trial judge's instruction broadened the basis for petitioner's conviction from the eight overt acts charged in the indictment to the charged acts *plus* any of the "million overt acts" the government claimed to have proved which the jury found to be in some undefined way "substantially the same" as any charged overt act.

This broadening of the basis of conviction has constitutional implications, for it amounts to trying petitioner "on charges that [were] not made in the indictment against [her]." Stirone v. United States, 361 U.S. 212, 217 (1960). When the trial evidence or the jury instructions operate to "broaden[] the possible bases for conviction from that which appeared in the indictment," the indictment has been constructively amended. United States v. Miller, 471 U.S. 130, 138 (1985). As the Court of Appeals in this case correctly recognized, a constructive amendment of the indictment is a *per se* violation of the Fifth Amendment, requiring reversal without a showing of prejudice. 156 F.3d at 337 n.5; see Stirone, 361 U.S. at 217 ("deprivation of such a basic right is far too serious to be treated as nothing more than a variance and then dismissed as harmless error"); United States v. Roshko, 969 F.2d 1, 5-6 (2d Cir. 1992).

These well-established principles plainly conflict with the Second Circuit's "well-established rule" that "the overt act element of a conspiracy charge may be satisfied by an overt act that is not specified in the indictment." 156 F.3d at 337. If an overt act is an essential element of a §371 conspiracy, it is impossible to harmonize the constitutionally-based principle that the government must prove the elements of the crime as

charged in the indictment with the principle articulated by the Second Circuit that the overt act element can be satisfied by an overt act not charged in the indictment.

The explanation for the conflict is found in United States v. Negro, 164 F.2d 168 (2d Cir. 1947), the earliest case cited by the Court of Appeals and the one to which all of the other string-cited cases owe their origins. While reversing on other grounds, the Negro court explicitly concluded in *dicta* that the issue whether an uncharged overt act could support a conspiracy conviction "turns on whether, under 18 U.S.C. §88 [§371's nearly identical predecessor], an overt act is an element of the crime of conspiracy." 164 F.2d at 172. Negro answered the question in the negative: "We believe that, at least for some purposes, the overt act is not part of the crime." Id. As a result, Negro found a non-fatal variance between the overt act alleged and the one proven at trial. Had Negro concluded that an overt act is an essential element of the conspiracy statute, the opinion, by its own terms, would have been different.

Whatever ambiguity may have existed as to the status of overt acts 50 years ago when Negro was decided, there is no ambiguity now: an overt act is an essential element of §371, and the Court of Appeals recognized as much. Thus, far from supporting the long line of cases which followed it, Negro is clear authority for petitioner's position that a jury is not permitted to rest a §371 conviction exclusively on an uncharged overt act.

In Shabani, the Court reinstated the defendant's narcotics conspiracy conviction because the lower court had mistakenly assumed that §371's overt act requirement applied to 21 U.S.C. §846, despite the critical "textual variations"

between the two statutes (i.e., §846 does not require an overt act). 513 U.S. at 15. This case is close to a mirror image of Shabani, since the Second Circuit and the cases it relies on appear to ignore the fact that an overt act is an essential element of a §371 conspiracy. These cases also ignore the fact that the Negro rule "turn[ed] on" whether an overt act is an element of the crime. As a result, it is up to this Court to reconcile Negro and its progeny with the requirements of the Grand Jury Clause. Such a reconciliation should result in the conclusion that the government is required to prove at least one charged overt act.

In short, the Second Circuit has decided an important question of conspiracy law that has not been, but should be, settled by this Court. U.S. Sup. Ct. Rule 10(c). At the same time, the Second Circuit has disregarded this Court's constructive amendment jurisprudence, and has thereby "decided an important federal question in a way that conflicts with relevant decisions of this Court." Id.

III.

This cases raises yet another fundamental issue of federal conspiracy law, one on which neither this Court nor virtually any other court has spoken: What constitutes an "act to effectuate the object of the conspiracy" within the meaning of §371? In particular, is the 12-month course of conduct alleged in ¶19h of the indictment, and submitted to the jury as a basis on which to convict petitioner, such an "act"?

There is a surprising absence of authority as to what constitutes a valid overt act under §371, beyond the general proposition that an overt act is one committed during the course and in furtherance of the charged conspiracy. See, e.g., Grunewald, 353 U.S. at 414-15. The language of §371 itself ("any act" to effect the object of the conspiracy) appears to contemplate a single, discrete and temporally limited "act." Certainly the statutory language is inconsistent with, and does not envision, an overt act allegation describing a year-long course of conduct that simply restates the conspiracy, as ¶19h does. See Marino v. United States, 91 F.2d 691, 694-95 (9th Cir. 1937) ("An overt act is something apart from the conspiracy"); United States v. Grossman, 55 F.2d 408, 410 (E.D.N.Y. 1931) (overt act must be "independent" of conspiracy and must not be "series of acts constituting the agreement"); cf. United States v. Doherty, 867 F.2d 47, 61 (1st Cir. 1989) (Breyer, J.) (holding "series" of alleged acts inadequate to satisfy statute of limitations in §371 prosecution).

Here, ¶19h alleges a course of conduct coterminous with the conspiracy, and essentially restates the conspiracy itself. Compare ¶19 with ¶¶14-18. As a result, the jury was

essentially permitted to convict petitioner without finding any overt act, because the jury could easily have confused ¶19h with the conspiratorial agreement and, relying on ¶19h to satisfy the overt act requirement, convicted solely on the basis of the agreement.

Moreover, the overt act alleged in ¶19h failed to satisfy the Sixth Amendment's notice requirements. See supra p. 2. Petitioner could not be expected to prepare a defense against the year-long course of conduct alleged in ¶19h, particularly since she was denied a bill of particulars. This constitutional problem is completely and easily avoided by requiring the government to allege a specific and temporally limited overt "act," as the plain language of §371 appears to contemplate.

To avoid an errant line of lower court authority like the one that developed from Negro (see supra Point II), the Court should clarify the meaning of the critical word "act" in §371. There is no reason to wait any longer for the lower courts to develop that meaning since they have already had 130 years in which to do so.

Accordingly, the Court should grant the writ to settle this important question of federal law. U.S. Sup. Ct. Rule 10(c).

CONCLUSION

For the foregoing reasons, the writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

August Term, 1997

(Argued: December 10, 1997* Decided: Sep. 15, 1998)

Docket Nos. 96-1775, 96-1780

UNITED STATES OF AMERICA,
Appellee,

v.

SUSAN FRANK and JANE FRANK KRESCH,
Defendants-Appellants.

Before: Cabranes, *Circuit Judge*, and Parker,** *District Judge*

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*. Judge Frank X. Altimari voted for the disposition herein, but due to illness was unable to consider this opinion. He died on July 19, 1998. The remaining members of the panel, who are in agreement, have decided this case and issued this opinion pursuant to Second Circuit Local Rule §0.14. *See United States v. Desimone*, 140 F.3d 457 (2d Cir.1998).

**. The Honorable Barrington D. Parker, Jr., of the United States District Court for the Southern District of New York, sitting by designation.

Appeal from judgments entered in the United States District Court for the Eastern District of New York (Jack B. Weinstein, *Judge*) convicting defendants-appellants, following a jury trial, of conspiracy to commit mail fraud, in violation of 18 U.S.C. §§ 371 and 1341. On appeal, appellants argue: (1) that there was insufficient evidence to sustain their convictions; (2) that the district court erred in its instruction on "intent to defraud;" (3) that the district court's overt act instruction constructively amended the indictment; and (4) that the district court's statute of limitations instruction improperly allowed the jury to convict based on a potentially time-barred conspiracy.

Affirmed.

RICHARD A. GREENBERG, Newman & Schwartz, New York, NY (Karl E. Pflanz, Steven Y. Yurowitz, of counsel), *for Defendant-Appellant Susan Frank*.

GERALD B. LEFCOURT, New York, NY (Richard Ware Levitt, of counsel), *for Defendant-Appellant Jane Frank Kresch*.

LESLIE CORNFIELD, Assistant United States Attorney for the Eastern District of New York, Brooklyn, NY (Zachary W. Carter, United States Attorney for the Eastern District of New York, David C. James, Assistant United States Attorney, of counsel), *for Appellee*.

PER CURIAM:

Susan Frank and Jane Frank Kresch appeal from judgments entered by the United States District Court for the Eastern District of New York (Jack B. Weinstein, *Judge*) convicting them, after a jury trial, of conspiracy to commit mail fraud, in violation of 18 U.S.C. §§ 371 and 1341.[1] The district court sentenced Frank principally to three years of

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1. 18 U.S.C. § 371, the federal conspiracy statute, provides in pertinent part that "[i]f two or more persons conspire ... to commit any offense against the United States ... in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined under this title or imprisoned not more than five years, or both."

18 U.S.C. § 1341, the federal mail fraud statute, provides in pertinent part that "[w]hoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, ... knowingly causes to be delivered by mail ... any ... matter or thing, shall be fined under this title or imprisoned not more than five years, or both."

probation, including eight months of home confinement, and a $10,000 fine. It sentenced Kresch principally to a term of imprisonment of one year and one day, two years of supervised release, and a $10,000 fine. The appellants' principal claims on appeal are: (1) that there was insufficient evidence of an intent to commit mail fraud; (2) that the district court erred in its instruction on "intent to defraud;" (3) that the district court's overt act instruction constructively amended the indictment; and (4) that the district court's statute of limitations instruction impermissibly allowed the jury to convict the appellants on the basis of a potentially time-barred conspiracy.

We affirm.

I.

We describe below the evidence before the jury, which we are required to view in the light most favorable to the government. *See Glasser v. United States*, 315 U.S. 60,

80 (1942); *United States v. LaBarbara*, 129 F.3d 81, 82 (2d Cir.1997). Frank and Kresch were the comptroller and "sludge coordinator,"[2] respectively, of General Marine Transport Corporation ("General Marine"). For many years, including the period from January 1988 through January 1989, General Marine contracted with various municipalities in New York and New Jersey to transport raw sewage sludge by barge for disposal at sea. In keeping with federal regulations that were phased in during 1987 and took effect in 1988, the contracts called for General Marine to dispose of the waste at a site 106 miles from shore. Prior to 1987, federal law had required that sewage sludge be disposed of only 12 miles from shore. As a result of the new legal requirement, General Marine's municipal customers paid two to four times more for disposal at the 106-mile site.

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2. As a "sludge coordinator," Kresch was responsible for directing the activities of General Marine's barges.

Throughout 1988, General Marine's barges routinely dumped sludge in waters well short of the 106-mile site. Nonetheless, General Marine billed its municipal customers – by mail – as if the sludge were being dumped in accordance with General Marine's contractual and legal obligations. Both Frank and Kresch were actively involved in General Marine's billing practices. Moreover, for the purpose of concealing General Marine's "short-dumping," both defendants participated in the falsification of billing-related records.

Based on the practices described above, an indictment returned on July 1, 1993 charged the appellants and others with conspiracy to defraud various public entities in New York and New Jersey, in violation of 18 U.S.C. §§ 371 and 1341. The indictment also charged the appellants and others with several environmental crimes. Judge Edward Korman, to whom the case was initially assigned, severed the environmental crime counts and tried those counts first; the

appellants were acquitted. The appellants were then tried before Judge Weinstein on the single count of conspiracy to commit mail fraud and were convicted.[3] This appeal followed.

II.

A. *Sufficiency of the Evidence*

The appellants' first claim is that there was insufficient evidence to support their convictions for conspiracy to commit mail fraud because the government purportedly failed to prove that the appellants had any intent to harm their municipal customers. *See United States v. D'Amato*, 39 F.3d 1249, 1257 (2d Cir.1994) (18 U.S.C. § 1341 requires that the government prove that the defendant contemplated some actual harm or injury to the victim). The appellants maintain that the municipalities got precisely what they bargained for – sludge disposal – and that, accordingly, the appellants neither

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3. The appellants' two co-defendants were acquitted.

intended nor caused the municipalities any harm. The appellants premise their argument on the assertion that it was irrelevant to the municipalities that not all of the sludge was dumped at the 106-mile site. This challenge to the sufficiency of the evidence "faces a heavy burden, because we must view the evidence in the light most favorable to the government and ask only whether a rational jury could find beyond a reasonable doubt" that the appellants intended or contemplated some harm to the municipalities. *LaBarbara*, 129 F.3d at 84. We believe that the appellants have failed to meet that heavy burden here and that there was ample evidence to support the appellants' convictions.

A defendant who has used the mails fraudulently to bill a customer for services that have not been provided may not defeat a mail fraud charge simply by providing alternative services. *See United States v. Wallach*, 935 F.2d 445, 461 (2d Cir.1991); *see also United States v. Paccione*, 949 F.2d

1183, 1196 (2d Cir.1991) ("Use of the mails in furtherance of a scheme to offer services in exchange for a fee, with the intent not to perform those services, is within the reach of § 1341."), *cert. denied*, 505 U.S. 1220 (1994). The evidence in this case showed that the municipalities contracted for disposal at the 106-mile site, that they paid a premium for that service, that General Marine in fact routinely dumped sludge in waters short of the 106-mile site, and that the appellants nonetheless participated in a fraudulent scheme to bill the municipalities by mail as if all of the waste disposal had occurred at the 106-mile site. Moreover, a representative of one of the municipalities testified that General Marine's short-dumping could have subjected the municipality to fines and to the loss of its environmental permit. This evidence suffices to establish that the appellants intended to harm the municipalities.

The appellants' reliance on *United States v. Starr*, 816 F.2d 94 (2d Cir.1987), is misplaced. The defendants in that case were operators of a bulk mailing service who cheated the Postal Service by concealing higher-rate packages in mail sacks that were supposed to contain only lower-rate packages. *See id.* at 96. Although the Postal Service was victimized by the scheme, the indictment charged the defendants only with defrauding their own customers. *See id.* at 97 n.4. We reversed the defendants' mail fraud convictions, on the ground that the customers had received the same service they would have received had the defendants paid the proper postage. *See id.* at 99. By contrast, in this case the municipalities did not receive the service – sludge disposal at the 106-mile site – for which they had contracted and paid. Accordingly, *Starr* is of no help to the appellants here.

B. *Jury Instruction on "Intent to Defraud"*

The appellants next claim that the district court's instruction on "intent to defraud" was in error. The district court instructed the jury as follows:

> Intent to defraud means to act knowingly and with the specific intention to deceive for the purpose of causing some financial loss to another *or gain to oneself or to another person*.

(emphasis added). The appellants argue that this instruction impermissibly allowed the jury to convict on the basis that the appellants intended to cause *either* loss to their customers *or* gain to themselves, even though only the former satisfies the mail fraud statute's element of fraudulent intent. In support of their argument, the appellants again rely on *Starr*. There, we found that, "[t]o the extent that [a virtually identical] charge permit[ted] the jury to find an intent to defraud based solely on the defendants' appropriation of a benefit to themselves, it [was] error." *Starr*, 816 F.2d at 101. We

believe that the appellants' claim in the instant case is without merit.

In light of the appellants' conceded failure to object at trial, we review the district court's instruction for plain error, *see* Fed.R.Crim.P. 52(b) (plain error standard) – a standard that requires "'(1) error, (2) that is plain, and (3) that affect[s] substantial rights. If all three conditions are met, an appellate court may then exercise its discretion to notice a forfeited error, but only if (4) the error seriously affect[s] the fairness, integrity, or public reputation of judicial proceedings.' " *United States v. Rossomando*, 144 F.3d 197, 200 (2d Cir. 1998) (quoting *Johnson v. United States*, 520 U.S. 461, ___, 117 S. Ct. 1544, 1549 (1997)). To determine if there was plain error, we will review an "erroneous instruction in light of other instructions and the evidence to determine what findings the jury made and whether such findings are the functional equivalent of required findings." *United States v.*

Chandler, 98 F.3d 711, 715 (2d Cir. 1996) (internal quotation marks omitted).

In *Chandler*, we reviewed for plain error an instruction in a bank fraud case under 18 U.S.C. § 1344, which we recognized to have been modeled on the mail and wire fraud statutes. *See id.* at 715. The defendant in *Chandler* had used false identification to obtain a line of credit from a bank and then made purchases using that line of credit. *See id.* at 713. The trial judge failed to instruct the jury that, in order to convict the defendant of bank fraud, it had to find an intent to cause the bank actual harm; instead, the judge instructed the jury only that it needed to find an intent to deceive. We found that the instruction was in error, because an intent to harm is an essential element of bank fraud. *See id.* at 714-15. Nonetheless, we observed that, "[e]ven though the court did not require a finding of intent to harm in its instructions defining 'scheme to defraud,' this error

is not prejudicial if the jury's finding of intent to deceive is the 'functional equivalent' of a finding of intent to harm." *Id.* (internal quotation marks omitted). We reasoned that Chandler's deceit in obtaining the line of credit was "inexplicable other than as a means of intentionally exposing [the bank] to an unwanted risk." *Id.* at 716. Moreover, because "the intent to harm [was] inextricably bound to the intent to deceive" we concluded that the jury's finding of intent to deceive was the "functional equivalent of the essential finding of intent to harm." *Id.* Accordingly, we found that the defendant had not been prejudiced by the instruction and that there was no plain error.

Similarly here, it was error for the district court to instruct the jury that it could find an intent to defraud based solely on the appellants' desire to gain a benefit for themselves. *See Starr*, 816 F.2d at 101. However, as in *Chandler*, we believe that this error worked no prejudice.

The appellants' intended gain to themselves was inextricably bound to a corresponding loss to their customers. The essence of the appellants' scheme was to obtain money by inducing their customers to pay for services that were not provided. Because the jury here presumably found that the appellants intended to gain from their scheme, it follows that it also found the "functional equivalent" – an intended loss to the appellants' customers. Accordingly, the appellants were not prejudiced by the jury instruction and there was no plain error.

C. *Jury Instruction on the Overt Act Requirement*

The appellants next claim that the district court's jury instruction regarding the overt act element of the § 371 conspiracy charge constructively amended the indictment.

The district court's instruction, in pertinent part, was as follows:

> The third element of the crime that the government has to establish beyond a

> reasonable doubt is that *at least one of the overt acts charged in the indictment or one which is substantially the same as one explicitly charged* was knowingly committed by at least one of the conspirators for the purpose of carrying out the unlawful agreement.
>
> ... You have to agree on at least one overt act charged or substantially the same as one explicitly charged.

(emphasis added).

The appellants assert that the district court's use of "substantially the same" constructively amended the indictment, in violation of the grand jury clause of the Fifth Amendment.[4] The argument is without merit.

To prevail on a constructive amendment claim, a defendant must demonstrate that either the proof at trial or the trial court's jury instructions so altered an essential element of the charge that, upon review, it is uncertain

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4. The Fifth Amendment provides in pertinent part that "[n]o person shall be held to answer for a ... crime, unless on presentment or indictment of a Grand Jury."

whether the defendant was convicted of conduct that was the subject of the grand jury's indictment. *See United States v. Zingaro*, 858 F.2d 94, 98 (2d Cir.1988). In the case before us, the appellants do not claim that the district court permitted the government to introduce any evidence relating to conduct that differed significantly from that described in the indictment. Nor do the appellants claim that the district court's instruction referred to any such evidence. In the absence of any indication that the evidence adduced at trial impermissibly broadened the basis of the appellants' convictions, we cannot accept the argument that the district court's mere use of the "substantially the same" language constructively amended the indictment.

In fact, the district court's instruction is entirely consistent with the well-established rule of this and other circuits that the overt act element of a conspiracy charge may be satisfied by an overt act that is not specified in the

indictment, at least so long there is no prejudice to the defendant.[5] *See, e.g., United States v. Bryan*, 122 F.3d 90,

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5. Courts addressing the issue of whether a conspiracy may be proven by an overt act not specified in the indictment have tended to define the relevant inquiry as whether there was a "variance" between the indictment and the proof at trial. When dealing with proof of an essential element of the offense, the difference between a "constructive amendment" and a variance seems to us to be merely one of degree. In *Zingaro*, for example, we noted that

> An *amendment* of the indictment occurs when the charging terms of the indictment are altered, either literally or in effect, by prosecutor or court after the grand jury has last passed upon them. A *variance* occurs when the charging terms of the indictment are left unaltered, but the evidence offered at trial proves facts materially different from those alleged in the indictment.

Id., 858 F.2d at 98 (quoting *Gaither v. United States*, 413 F.2d 1061, 1071 (D.C.Cir.1969)). There is, however, one significant difference between the two – a constructive amendment of the indictment is considered to be a *per se* violation of the grand jury clause, while a defendant must show prejudice in order to prevail on a variance claim. *See id.* We need not decide here whether a difference between an overt act proved at trial and that alleged in the indictment could ever be so significant as to give rise to a valid constructive amendment claim. It is enough for us to say (1) that it was not improper *per se* for the district court to instruct the jury that the overt act element could be satisfied by an act not listed in the indictment; and (2) that, under the facts presented in this case, the appellants have established neither that the district court

(continued...)

93 (2d Cir. 1997); *United States v. Fassoulis*, 445 F.2d 13, 19 (2d Cir. 1971); *United States v. Armone*, 363 F.2d 385, 400-01 (2d Cir.), *cert. denied*, 385 U.S. 957 (1966); *United States v. Negro*, 164 F.2d 168, 173 (2d Cir.1947); *see also United States v. Schurr*, 794 F.2d 903, 907 n.4 (3d Cir. 1986); *United States v. Morales*, 677 F.2d 1, 2 (1st Cir. 1982); *United States v. Clay*, 495 F.2d 700, 706 (7th Cir.), *cert. denied*, 419 U.S. 937 (1974); *Brulay v. United States*, 383 F.2d 345, 350-51 (9th Cir.), *cert. denied*, 389 U.S. 986 (1967); *Strauss v. United States*, 311 F.2d 926, 932 (5th Cir.), *cert. denied*, 373 U.S. 910 (1963). These cases reflect the fact that, "[b]ecause proof at trial need not, indeed cannot, be a precise replica of the charges contained in the indictment, this court has consistently permitted significant flexibility in proof, provided that the defendant was given

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5. (...continued)
constructively amended the indictment nor that there was a prejudicial variance.

notice of the core of criminality to be proven at trial." *United States v. Heimann*, 705 F.2d 662, 666 (2d Cir. 1983) (internal quotation marks omitted); *accord United States v. Patino*, 962 F.2d 263, 266 (2d Cir. 1992). There is no indication in the record here that the evidence adduced at trial unfairly surprised the appellants or prejudiced them in any other way. If anything, the district court's use of the "substantially the same" language avoided prejudice to the defendants by ensuring that they would not be convicted on the basis of an overt act that differed in any significant way from the overt acts specified in the indictment.

D. *Jury Instruction Regarding the Statute of Limitations*

The appellants' final contention, closely related to the one we have just considered, is that the district court's instruction on the statute of limitations allowed the jury to convict on the basis of a potentially time-barred conspiracy. Again, the appellants' argument is that the district court

improperly allowed the jury to find the statute of limitations satisfied by an act "substantially the same" as one charged in the indictment. The relevant instruction, to which the appellants objected before the district court,[6] is as follows:

> The fourth element the government must prove is that this prosecution is not barred or precluded by what is known as the statute of limitations....
>
> ....
>
> So in this case the government must prove that the conspiracy agreement charged was in existence on July 2, 1988 and that at least one overt act in furtherance of the conspiracy was performed after that date. Accordingly you must return a verdict of not guilty unless you find that the government has proven beyond a reasonable doubt that the conspiracy charged in the indictment continued on or after July 2, 1988 and that *an overt act was performed*

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6. The government unpersuasively maintains that the appellants preserved their challenge only with regard to the overt act portion of the instruction. The record, however, indicates that the district court was fully aware of the appellants' objection to the use of the "substantially the same" language in the context of both the overt act and the statute of limitations instructions.

after that date as I've defined overt act for you.[7]

(emphasis added)

The appellants argue that, even if the government may satisfy the overt act element of § 371 by proof of an act not explicitly charged in the indictment, the statute of limitations element may only be satisfied by an act that is explicitly charged. According to the appellants, this is an issue of first impression in this Circuit.

We see no reason to devise a special rule for the statute of limitations requirement that is different from the rule governing the overt act element. In the matter of the statute of limitations, as in the case of overt acts generally, our principal concerns are that a defendant have fair and adequate notice of the charges against him and have suffered no undue prejudice as a result of the proof offered. *See*

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7. Here the district court was clearly referring to the overt act instruction that we set forth and discussed in the previous section.

Schurr, 794 F.2d at 907 n.4 ("It is well settled that the government can prove overt acts not listed in the indictment, so long as there is no prejudice to the defendants thereby. There would appear to be no reason that the government could not satisfy its requisite showing under the statute of limitations by means of an overt act not listed in the indictment.") (citations omitted). In other words, the statute of limitations may be satisfied by proof of an overt act not explicitly listed in the indictment, as long as a defendant has had fair and adequate notice of the charge for which he is being tried, and he is not unduly prejudiced by the asserted variance in the proof.

In this case, there is no indication that the appellants were prejudiced by the district court's instruction on the statute of limitations requirement. The grand jury returned the indictment on July 1, 1993. Accordingly, pursuant to the five-year limitations period set forth in 18 U.S.C. § 3282, the

government was required to prove that at least one overt act in furtherance of the conspiracy was committed after July 1, 1988.[8] The indictment alleged at least two timely overt acts and the government offered evidence to support both: in August 1988, the appellants caused a General Marine employee to falsify records to conceal illegal dumping; and on October 30, 1988, a General Marine barge illegally dumped sludge near New Jersey, short of the 106-mile site required by law and by contract.[9] By instructing the jury both (1) that it had to find that a timely overt act was committed and (2) that

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8. 18 U.S.C. § 3282 provides that "[e]xcept as otherwise expressly provided by law, no person shall be prosecuted, tried, or punished for any offense, not capital, unless the indictment is found or the information is instituted within five years next after such offense shall have been committed."

9. The indictment also alleged the following additional overt acts: that between January and March 1988 a co-defendant and others caused barges illegally to dump sludge short of the 106-mile site (a facially untimely overt act); and that between February 1988 and January 1989 the appellants and others caused fraudulent bills to be sent through the mails to public entities in New York and New Jersey (since acts committed after July 1, 1988 were within the limitations period, it is possible that this category included timely overt acts).

the timely overt act had to be either listed in the indictment or substantially the same as an act listed in the indictment, the district court scrupulously avoided any prejudice to the appellants.[10]

III.

To summarize:

(1) The appellants' challenge to the sufficiency of the evidence fails because there was ample proof that the appellants intended to harm General Marine's municipal customers by billing them for services that General Marine did not provide.

(2) The appellants' challenge to the district court's instruction on "intent to defraud" fails because, under the

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10. The appellants' reliance on *United States v. Davis*, 533 F.2d 921 (5th Cir.1976), and its progeny is misplaced. In *Davis*, the Fifth Circuit did not permit a defendant's conviction to stand based on uncharged timely overt acts that were proven at trial. *See id.* at 926-29. However, in *Davis*, *none* of the overt acts alleged in the indictment was timely. In contrast, in the instant case the grand jury charged and the government proved timely overt acts.

circumstances presented here, the jury's finding of an intended gain to the appellants was the "functional equivalent" of an intended harm to General Marine's municipal customers.

(3) The appellants' challenge to the district court's overt act instruction fails because the appellants did not demonstrate that the instruction constructively amended the indictment by impermissibly broadening the basis for their convictions.

(4) The appellants' challenge to the statute of limitations instruction fails because we reject their contention that the statute of limitations may only be satisfied by an act listed in the indictment and because the appellants were not prejudiced by the district court's instruction.

We have carefully considered all of the appellants' arguments and find them to be without merit.[11]

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11. Both defendants claim also that the trial counsel who jointly represented them labored under a conflict of interest, thereby denying them their Fifth and Sixth Amendment rights; Frank

(continued...)

The judgments of the district court are affirmed.

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11. (...continued)
challenges an evidentiary ruling of the district court and the district court's denial of motions for a bill of particulars and for a special interrogatory on overt acts; and Kresch claims that the conduct at issue was chargeable only under the Federal Water Pollution Control Act (Clean Water Act), 33 U.S.C. § 1251, *et seq.*

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
UNITED STATES COURT HOUSE
40 FOLEY SQUARE
NEW YORK 10007

CAROLYN CLARK CAMPBELL
CLERK

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 20th day of November one thousand nine hundred and ninety-eight.

USA

v

Dkt No: 96-1775 (L)

Frank

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by the appellant Susan Frank.

Upon consideration by the panel that decided the appeal, it is Ordered that said petition for rehearing is **DENIED.**

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges for the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

FOR THE COURT

CAROLYN CLARK CAMPBELL, Clerk

By: /s/
Beth J. Meador,
Administrative Attorney

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inbancdn_frm

Supreme Court, U.S.
FILED
MAR 5 1999
CLERK

98-1329

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

SUSAN FRANK,

Petitioner,

against

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

RESPONSE OF JANE KRESCH SUPPORTING PETITION FOR WRIT OF CERTIORARI

JANE KRESCH
Respondent, Pro Se
860 Park Avenue
New York, New York 10021

On February 18, 1999 this Court docketed petitioner Susan Frank's petition for a writ of certiorari to the United States Court of Appeals for the Second Circuit. Docket No. 98-1329. Respondent Jane Kersch was a co-defendant in the trial in the District Court and a co-appellee in the Court of Appeals. As a result, she is entitled to the status of respondent in these proceedings and to file documents in this Court. See U.S. Sup. Ct. Rule 12.6. Kersch supports Frank's position as stated in her petition and seeks the same relief from this Court.

Respectfully submitted,

JANE KRESCH
Respondent, Pro Se
860 Park Avenue
New York, New York 10021

Dated: March 3, 1999